



10/10/03 Inform. For...
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DAQPS
cc: Daniel Holmstead
NAClose

Jeffrey Holmstead
Assistant Administrator
US EPA Office of Air and Radiation
1200 Pennsylvania Avenue N.W. (6101A)
Washington DC 20460

August 11, 2003

Re: Recommendations on Attainment/Non-Attainment areas under the 8-Hour Ozone Standards:

Dear Mr. Holmstead:

As you know, EPA has established July 15, 2003, as the deadline for tribes and states to submit recommendations regarding attainment/non-attainment areas under the 8-hour ozone standards. You will no doubt be receiving such recommendations from a small number of tribes which have the program capacity to formulate them, and which are most acutely interested in ozone designation issues. We urge the Agency to give these recommendations the full consideration they are due as the positions of sovereign tribal governments, whether or not such tribes have received "treatment as state" status under relevant provisions of the Clean Air Act.

The purpose of this letter is to convey the positions of the NTAA, based on recommendations from the National Tribal Designation and Implementation Work Group, and urge EPA to apply the principles contained therein as it makes designations for all areas of the nation, including on tribal lands where tribes have not submitted recommendations.

Background

Tribal governments are very concerned with the health and well being of their people, and with protection of the environment. The holistic view of Indian peoples regarding the natural world and the place of humans in it has been well documented over the centuries since European contact. Yet tribes must also contend with the host of challenges that face all modern governments. Included among these issues are environmental protection, economic development, maintaining public support, and working with other government entities. NAAQS designations have implications across all these areas.

As is commonly noted, with few exceptions tribal lands do not contain significant sources of air pollution, either in the form of major stationary sources or large aggregations of area and mobile sources. Thus, where tribal lands face potential non-attainment status, it is nearly, if not always, a result of pollution transported from non-tribal areas.

Where tribal lands are designated Non-Attainment due to activities occurring outside of reservations, tribal economic development may be adversely and unfairly affected by the increased regulatory burden associated with non-attainment status. Moreover, the inequity of this situation is exacerbated by the unavailability of various tools available to states with more fully developed air quality management regimes, such as the authority to issue "synthetic minor" permits. In addition, the notion of a Non-Attainment Area projects a negative image of the reservation. This status gives the impression that the tribe may not be protecting its natural resources though in almost all cases the tribe is not the cause of the pollution problem.

For these reasons, EPA must perform a full and careful consideration of the facts whenever a tribal area may be designated non-attainment. The follow points elaborate on these concerns.

Use of Metropolitan Statistical Areas

Despite consistent and prolonged objections from tribes, EPA intends to use Metropolitan Statistical Areas or Consolidated Metropolitan Statistical Areas (collectively referred to as C/MSA's) as the default for establishing designation boundaries. This process infringes on Tribal Sovereignty by potentially imposing Non-Attainment Area requirements from adjacent jurisdictions on tribal governments.

The rationale for using C/MSA's -- to protect public health from the adverse affects of ozone pollution caused by population density, traffic and commuting patterns, commercial development, and area growth -- does not justify the application to tribal areas. Reservations which are nominally part of C/MSA's may not in fact be socially or economically integrated into the C/MSA. Inclusion of tribal lands within large C/MSA based non-attainment areas will thus do nothing to reduce pollution within these areas but will unjustifiably place the burden associated with being designated Non-Attainment onto tribes. This is especially true in the Western United States where several counties, which underlie the C/MSA's, are larger than some Eastern states, and may contain diverse economic and air quality conditions.

The use of C/MSAs as the default would result in numerous tribes being designated as Non-Attainment even though emissions from sources located within the reservation do not cause or contribute to violations of the National Ambient Air Quality Standard (NAAQS). This is not only unjust, but in cases where the non-attainment designation is not independently justified by an exceedence of the standard within the reservation, it is inconsistent with Section 107 (d) of the Clean Air Act.

Therefore, the presumption should be reversed with respect to tribal areas -- the burden of proof should be on EPA to demonstrate affected tribal areas belong in the non-attainment area, based either on NAAQS violations or contribution to downwind violations.

We recognize that in the case of Serious, Severe, and Extreme areas, EPA's discretion regarding the use of C/MSA's is bounded by the Clean Air Act, specifically section

107(d)(4)(A). However, even in these situations, this section also contains procedures whereby state governors may petition EPA for more time to study whether certain areas of the C/MSA should be excluded. To the extent allowed by law, EPA should avoid using C/MSA to designate tribal areas, and where such use is mandated by operation of law, EPA should inform affected tribes of all procedural options available to them.

Inconsistency with the Tribal Authority Rule

The Tribal Authority Rule (TAR), promulgated in 1998, affords the authority to the Tribes to be treated in the same manner as a State. The TAR gives the tribes the opportunity to assert their sovereignty by developing an air program to protect air resources within their jurisdiction. If EPA establishes designation boundaries that do not respect tribal boundaries, tribes will be severely limited when developing air quality programs due to Non-Attainment restrictions that will be imposed on tribal governments. Tribes will have to implement Non-Attainment controls based on a neighboring jurisdiction requirements simply because the reservation is located adjacent to an area that has failed to control air pollution.

Data Concerns

Few tribes throughout the United States have had the opportunity to establish ambient air quality monitoring stations to collect sufficient data to base a designation recommendation. The U.S. EPA has indicated that they intend to use monitoring and modeling data from non-tribal jurisdiction to establish designation over tribal lands when there is a lack of actual tribal data. Tribes are extremely concerned with this approach and question the appropriateness of using data from a separate jurisdiction to base designation over tribal lands. Tribes are concerned that the data generated by a separate jurisdiction will not be representative of the conditions within the reservation. Tribes recommend that EPA use only monitoring data from within tribal lands to base designations and when data is lacking. Tribal lands should be designated unclassifiable until the required amount of data can be collected which accurately represents the state of air quality within the reservation. To assume that an area has compromised air quality standards based on questionable data is simply wrong and inconsistent with the intent of the Clean Air Act.

In conclusion, we recommend that, to the maximum extent allowed by law, EPA develop a process for designating tribal lands that does not rely on C/MSA as the default for establishing boundaries. This process should include establishing designation areas that considers tribal jurisdictional boundaries and honors tribal sovereignty. This should be done with the aim of ensuring that the burden associated with being designated Non-Attainment not to be shifted unjustifiably onto the tribes simply because tribal lands lie within a transport area. This would also allow tribes to develop air quality programs in accordance with the intent of the TAR, without having to contend with Non-Attainment requirements imposed from separate jurisdictions. Finally, we recommend that EPA use only monitoring data from within tribal lands to base designations, and when tribal monitoring data is lacking not to rely on neighboring jurisdiction data. In such cases

Tribal lands should be designated unclassifiable in accordance with Section 107 (d) of the Clean Air Act.

Thank you for your consideration of these factors during the designation process. Please contact Bill Grantham at 505-242-2175 or bgrantham@ntec.org for any questions or comments regarding the ideas in this letter. We look forward to continued cooperation for the protection of our precious air quality.

Sincerely,

A handwritten signature in black ink, appearing to read "Anthony Kitto". The signature is fluid and cursive, with the first name "Anthony" written in a larger, more prominent script than the last name "Kitto".

Anthony Kitto
Secretary/Treasurer
NTAA Interim Executive Committee

Cc: Lydia Wegman
Darrel Harmon
Carol Jorgensen
Mnisose